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No. 00-853

Supreme Court, U.S.
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In The
Supreme Court Of The United States
October Term, 2000

CORRECTION OFFICER PORTER AND
CORRECTION OFFICER WILLETTE
Petitioners,

v.

RONALD NUSSLE
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

This Court granted the petitioners' petition for a writ of certiorari on the following issue: "Did the Court of Appeals erroneously conclude, contrary to other courts of appeals, that an inmate bringing a claim for excessive force need not have exhausted available administrative remedies pursuant to the Prison Litigation Reform Act's mandatory exhaustion requirement, 42 U.S.C. § 1997e(a)?"

LIST OF PARTIES

In both the United States District Court for the District of Connecticut and the United States Court of Appeals for the Second Circuit, the plaintiff was Ronald Nussle.

In both courts below, the defendants are listed as Correction Officer Willette and Correction Officer Porter.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES..... ii

TABLE OF CONTENTS..... iii

TABLE OF AUTHORITIES..... vi

OPINIONS OF THE COURTS BELOW..... 1

JURISDICTION..... 2

STATUTORY PROVISION INVOLVED..... 2

STATEMENT OF THE CASE..... 2

SUMMARY OF THE ARGUMENT..... 4

ARGUMENT..... 5

A. THE HISTORY OF THE PLRA'S EXHAUSTION PROVISION REFLECTS CONGRESS' INTENT TO EXPAND THE SCOPE OF THE EXHAUSTION REQUEST..... 6

B. THE TEXT AND STRUCTURE OF THE PLRA AND THE EXHAUSTION PROVISION OF § 803 MANIFEST CONGRESS' CLEAR INTENT TO REQUIRE EXHAUSTION FOR EXCESSIVE FORCE CLAIMS..... 10

1. This Court Has Consistently Construed "Prison Conditions" Cases To Include Excessive Force Claims..... 12

2. In the PLRA, Congress Adopted This Court's Understanding That "Actions With Respect To Prison Conditions" Includes Excessive Force Claims..... 19

a. The Definition Of "Action With Respect To Prison Conditions" Contained In § 802 Of The PLRA Illuminates The Meaning Of The Same Phrase In § 803..... 20

b. Under Either Prong of § 802's Definition, An Excessive Force Claim Is An "Action... With Respect To Prison Conditions.". 23

i. The Phrase "Conditions Of Confinement" Includes Excessive Force Claims... 24

ii. The Phrase "The Effects Of Actions By Government Officials On The Lives Of Persons Confined In Prison" Includes Excessive Force Claims..... 26

C. THE PLRA'S LEGISLATIVE HISTORY PLAINLY DEMONSTRATES AN INTENT THAT THE EXHAUSTION REQUIREMENT APPLIES TO EXCESSIVE FORCE CLAIMS..... 28

D. BOTH THE PURPOSE OF THE PLRA AND THE POLICY UNDERLYING EXHAUSTION ARE WELL-SERVED BY APPLYING § 803 TO EIGHTH AMENDMENT EXCESSIVE FORCE CLAIMS..... 32

CONCLUSION..... 37

TABLE OF AUTHORITIES

CASES: PAGES:

Alexander v. Hawk, 159 F.3d 1321 (11th Cir. 1998)..... 28, 29

Almendarez-Torres v. United States, 523 U.S. 224 (1998)..... 11

Bailey v. United States, 516 U.S. 137 (1995)..... 6

Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971)..... 10

Booth v. Churner, 121 S.Ct. 1819 (2001)..... Passim

Commissioner v. Clark, 489 U.S. 726 (1989)..... 11

Commissioner v. Lundy, 516 U.S. 235 (1996)..... Passim

Cooper v. Pate, 378 U.S. 546 (1964)..... 13, 14

Cruz v. Beto, 405 U.S. 319 (1972)..... 9

Estelle v. Gamble, 429 U.S. 97 (1976)..... 16

Farmer v. Brennan, 511 U.S. 825 (1994)..... 17, 18

Freeman v. Francis, 196 F.3d 641 (6th Cir. 1999)....Passim

Garrett v Hawk, 127 F.3d 1263 (10th Cir. 1997)..... 6

Giano v. Goord, 250 F.3d 146 (2d Cir. 2001)..... 18

Gustafson v. Alloyd Co., Inc., 513 U.S. 557 (1995)..... 28

Haines v. Kerner, 404 U.S. 519 (1972).....13, 14

Helvering v. Stockholms Enskilda Bank, 293 U.S. 84 (1934)..... 21

Higginbothom v. Carter, 223 F.3d 1259 (11th Cir. 2000)..... 6, 26

Holloway v. United States, 526 U.S. 1 (1999)..... 5

Houghton v. Shafer, 392 U.S. 639 (1968)..... 13, 14

Hudson v. McMillian, 503 U.S. 1 (1992)..... Passim

Lawrence v. Goord, 238 F.3d 182 (2d Cir. 2001)..... 18

Lewis v. Casey, 518 U.S. 343 (1996)..... 22. 33

Lorillard v. Pons, 434 U.S. 575 (1978)..... 25

Marvin v. Goord, 255 F.3d 40 (2d Cir. 2001)..... 18

McCarthy v. Bronson, 500 U.S. 136 (1991)..... Passim

McCarthy v. Madigan, 503 U.S. 140 (1992)..... Passim

Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996)..... 6

Mertens v. Hewitt Associates, 508 U.S. 248 (1993)..... 20

Miller v. French, 530 U.S. 327 (2000)..... 21, 32

Neitzke v. Williams, 490 U.S. 319 (1989)..... 31

Nussle v. Willette, 224 F.3d 95 (2d Cir. 2000)..... Passim

Patsy v. Board of Regents, 457 U.S. 496 (1982)..... Passim

Preiser v. Rodriguez, 411 U.S. 475 (1973)..... Passim

Rhodes v. Chapman, 452 U.S. 337 (1981)..... 16

Robinson v. Shell Oil Co., 519 U.S. 337 (1997)..... 6

Smith v. Zachary, 2001 U.S. App. Lexis 14339, * 5-6 (7th Cir. 2001)..... Passim

Sorenson v. Secretary of the Treasury, 475 U.S. 851 (1986)..... 21

Sullivan v. Stroop, 496 U.S. 478 (1990)..... 23

Turner v. Safley, 482 U.S. 78 (1987)..... 22

United States v. United States Gypsum Co., 438 U.S. 422 (1978)..... 25

United States v. Wells, 519 U.S. 482 (1997)..... 25

United States Savings Assoc. of Texas v. Timbers of Inwood Forest Assoc., Ltd., 484 U.S. 365 (1988)..... 24

Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765 (2000)..... 21

Wendell v. Asher, 162 F.3d 887 (5th Cir. 1998)..... 6

Weinberger v. Salfi, 422 U.S. 749 (1975)..... 36

Whitley v. Albers, 475 U.S. 312 (1986)..... 16

Williams v. Taylor, 120 S.Ct. 1479 (2000)..... 11

Williams v. Walsh, 558 F.2d 667 (2d Cir. 1977)..... 2

Wilson v. Seiter, 501 U.S. 294 (1991)..... Passim

STATUTES:

18 U.S.C. § 3626..... Passim

18 U.S.C. § 3636(g)(2)..... 23

28 U.S.C. § 636..... 2

28 U.S.C. § 636(b)(1)(B)..... 13, 14

28 U.S.C. § 1254(1)..... 2

28 U.S.C. § 2254(b)..... 20

42 U.S.C. § 1983..... Passim

42 U.S.C. § 1997e..... Passim

42 U.S.C. § 1997e(a)..... Passim

42 U.S.C. § 1997e(c)..... Passim

Prison Litigation Reform Act of 1995,
Pub. L. No. 104-134, 110 State. 1321-73 (1996)
("PLRA"), *codified at* 42 U.S.C. § 1997e(a)..... Passim

OTHER:

141 Cong. Rec. H35,623 (1995)..... 34

141 Cong. Rec. H35,624 (1995)..... 30, 34

141 Cong. Rec. S14,413 (1995)..... 29

141 Cong. Rec. S14,570 (1995)..... 29

141 Cong. Rec. S14,571 (1995)..... 28

141 Cong. Rec. S14,572 (1995)..... Passim

141 Cong. Rec. S14,628 (1995)..... 29

141 Cong. Rec. S26,548 (1995)..... Passim

141 Cong. Rec. S26,553 (1995)..... Passim

141 Cong. Rec. S26,554 (1995)..... 9, 28

141 Cong. Rec. S27,042 (1995)..... 36

S. Rep. No. 94-625 p.2 (1976)..... 25

House Committee on the Judiciary,
Violent Criminal Incarceration Act of 1995,
H. Rep. No. 21, 104th Cong. 1rst Session 13 (1995)..... 9

R. Hanson and H. Daley,
U.S. Dept. of Justice Conditions of Prisons and Jails: A Report on Section 1983 Litigation
(1995)..... 29

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OPINIONS OF THE COURTS BELOW

The opinion of the United States Court of Appeals for the Second Circuit entered on August 24, 2000, is reported at *Nussle v. Willette*, 224 F.3d 95 (2d Cir. 2000), and is printed in the Joint Appendix at J.A. 54.

The memorandum of decision of the United States District Court for the District of Connecticut, *Nevas, J.*, dated November 22, 1999, is unreported, but is printed in the Joint Appendix at J.A. 43.

JURISDICTION

The United States Court of Appeals for the Second Circuit entered judgment on August 24, 2000. The petitioners invoked the jurisdiction of this Court under 28 U.S.C. § 1254(1), petitioning for certiorari on November 22, 2000. This Court granted the petition on June 4, 2001.

STATUTORY PROVISION INVOLVED

The statutes at issue appear in the Joint Appendix at J.A. 19 (42 U.S.C. § 1997e); J.A. 23 (18 U.S.C. § 3626); and J.A. 31 (28 U.S.C. § 636).

STATEMENT OF THE CASE

The respondent-plaintiff Ronald Nussle, alleges that on June 15, 1996, while an inmate at the Cheshire Correctional Institute, the petitioners-defendants, Correction Officers Porter and Willette, acting under color of law, and jointly and in concert with each other, beat him without justification. (Complaint, ¶¶ 10-11; J.A. 38-39.) He claims the officers beat him because he was a friend of Gov. John G. Rowland. (*Id.* ¶9.) Nussle further alleges that he "was told that if he reported this beating the guards would kill him." (*Id.* ¶12; J.A. at 39.)

The District Court determined (J.A. 50), and Nussle has not contested, that he never filed a grievance with Connecticut's Department of Corrections regarding his allegations about the officers' alleged conduct, although he could have pursuant to Administrative Directive 9.6, promulgated by Connecticut's Commissioner of Corrections. (J.A. 5.) Instead, on June 10, 1999, just days before the three year statute of limitations would have lapsed; *see Williams v. Walsh*, 558 F.2d 667, 670 (2d Cir. 1977) (3 year statute of limitations for § 1983 actions); Nussle filed this civil rights action against the officers pursuant to 42 U.S.C. §1983, alleging that the officers' use of "excessive force" violated his Eighth Amendment rights.[1/]

The officers moved to dismiss Nussle's action for failure to exhaust his administrative remedies, as required by § 803 of the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 State. 1321-73 (1996) ("PLRA"), *codified at* 42 U.S.C. § 1997e(a). This section of the PLRA provides that "no action shall be brought with respect to prison conditions . . . until such administrative remedies as are available are exhausted." The District Court, *Nevas, J.*, granted the officers' motion, and Nussle appealed to the United States Court of Appeals for the Second Circuit, which vacated the District Court's judgment and remanded.

The Court of Appeals rejected the officers' argument and the District Court's determination that claims of excessive force are "actions . . . with respect to "prison conditions" requiring exhaustion under § 803, and instead "conclud[ed] that exhaustion of administrative remedies is not required for claims of assault or excessive force brought under § 1983." *Nussle v. Willette*, 224 F.3d 95, 106 (2d Cir. 2000). [2/]

1/ The Connecticut Attorney General appeared for both Correction Officer Porter and Correction Officer Willette in their official capacities, to the extent the plaintiff sought relief against state officials, but appeared only for Correction Officer Porter individually inasmuch as it had been determined that there was no Correction Officer named Willette. The District Court granted judgment in favor of both Porter and Willette, the latter of whom, of course, had never been served. (J.A. 52.)

2/ The District Court had also rejected Nussle's alternative argument that the PLRA's exhaustion requirement did not apply to him because his complaint asked only for money damages and the administrative remedy provided did not provide for damages as a

SUMMARY OF THE ARGUMENT

Section 803 of the PLRA, codified at 42 U.S.C. § 1997e(a), requires the exhaustion of administrative remedies for a prisoner's claim of excessive force. The phrase "action . . . with respect to prison conditions" in § 803's exhaustion provision includes a claim brought under § 1983 alleging excessive force by prison officials. The construction of the statutory phrase "prison conditions" as including an official's alleged use of excessive force is entirely consistent with a series of this Court's prior decisions interpreting substantively identical language. Indeed, it is apparent from the text, structure and history of the PLRA that Congress intended to incorporate this Court's broad understanding, reflected in decisions such as *McCarthy v. Bronson*, 500 U.S. 136 (1991), and *Wilson v. Seiter*, 501 U.S. 294 (1991), that the use of excessive force is encompassed in the meaning of the phrase "prison conditions."

Congress' purpose in requiring prisoner complainants to pursue administrative remedies was to reduce unnecessary prisoner lawsuits and the need for federal court intervention in the management of prisons. This purpose is served equally by requiring exhaustion of prisoner excessive force claims as it is for any other claim regarding prison conditions. As with any prison conditions claim, requiring exhaustion for excessive force claims allows for a prompt investigation of the allegations and, if warranted, remedial action, potentially eliminating the need for recourse to the courts.

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remedy. The Court of Appeals did not reach this issue, however, holding instead that excessive force claims fall outside the exhaustion requirement. This past term this Court unanimously rejected Nussle's alternative argument in *Booth v. Churner*, 121 S.Ct. 1819, 1825 (2001).

Moreover, in the very language of the PLRA, Congress reflected its intention to pursue these goals by extending broadly the exhaustion requirement. Specifically, although § 803 itself does not define the phrase "prison conditions," the closely related § 802 of the PLRA includes such a definition. Section 802's expansive definition -- which extends to both "conditions of confinement" and "the effects of actions by government officials on the lives of persons confined in prison" -- without question includes excessive force claims. Under the ordinary rules of statutory construction and in light of Congress' manifest purpose in enacting the PLRA, § 802's definition clearly informs § 803's use of the phrase "actions . . . with respect to prison conditions." To conclude otherwise would seriously undermine Congress' judgment that requiring exhaustion will serve to eliminate some of the unjustified burdens associated with prisoner litigation in the federal courts.

ARGUMENT

"The meaning of statutory language, plain or not, depends on context." *Holloway v. United States*, 526 U.S. 1, 7 (1999). An examination of the context of § 803 of the PLRA reveals that an Eighth Amendment action against corrections officers for the alleged use of excessive force is an "action . . . with respect to prison conditions" within the meaning of the PLRA. Congress' intent to require the exhaustion of administrative remedies for excessive force claims is manifested in the statute itself and is reflected in the statute's legislative history and purpose. The decision of the Court of Appeals rejecting this proposition is contrary to a consistent line of this Court's precedents holding that single episodes -- including episodes of

excessive force -- constitute "conditions," and therefore under the PLRA require the exhaustion of administrative remedies. It is also contrary to the conclusion of every other circuit court that has addressed this issue.[3/]

A. THE HISTORY OF THE PLRA'S EXHAUSTION PROVISION REFLECTS CONGRESS' INTENT TO EXPAND THE SCOPE OF THE EXHAUSTION REQUIREMENT.

In determining the meaning of a word or phrase, the Court "consider[s] not only the bare meaning of the word but also its placement and purpose in the statutory scheme." *Bailey v. United States*, 516 U.S. 137, 145 (1995). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific **context** in which that language is used, and the broader **context** of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (emphasis supplied). In evaluating the "context" of § 803 of the PLRA, the Court must consider how the provision was amended and the circumstances surrounding its amendment. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996). Therefore, a brief, historical overview of the exhaustion of remedies doctrine in the context of actions brought pursuant to 42 U.S.C. § 1983, and the evolution of 42 U.S.C. § 1997e is appropriate. This overview illustrates that Congress has acted to expand the

[3/] *See Smith v. Zachary*, 2001 U.S. App. Lexis 14339, *6-7 (7th Cir. 2001); *Higginbothom v. Carter*, 223 F.3d 1259, 1260-61 (11th Cir. 2000); *Booth v. Churner*, 206 F.3d 289, 293-98 (3d Cir. 2000), *aff'd on other grounds* 121 S.Ct. 1819 (May 29, 2001); *Freeman v. Francis*, 196 F.3d 641, 643-44 (6th Cir. 1999). *See also Wendell v. Asher*, 162 F.3d 887, 890-91 (5th Cir. 1998) (implicit); *Garrett v. Hawk*, 127 F.3d 1263, 1264-66 (10th Cir. 1997) (same).

applicability of this provision and has resisted judicial attempts to narrow it.

The doctrine requiring the exhaustion of administrative remedies "serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992). "When an agency has the opportunity to correct its own errors, a judicial controversy may well be mooted, or at least piecemeal appeals may be avoided. . . . And even where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration, especially in a complex or technical factual context." *Id.*

With regard to inmate litigation specifically, this Court has observed: "It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons." *Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1973). "[B]ecause most potential litigation involving state prisoners arises on a day-to-day basis, it is most efficiently and properly handled by the state administrative bodies and state courts, which are, for the most part, familiar with the grievances of state prisoners and in a better physical and practical position to deal with those grievances." *Id.* at 492.

In *Patsy v. Board of Regents*, 457 U.S. 496, 516 (1982), this Court held that 42 U.S.C. § 1983 does not have a general exhaustion requirement. With regard to inmates' § 1983 actions, however, the Court, took note of 42 U.S.C. § 1997e, as it provided then,[4/] and recognized that

[4/] Before its amendment by the PLRA in 1996, 42 U.S.C. § 1997e(a) provided:

(1) Subject to the provisions of paragraph (2), in any action

"Congress [had] decided to adopt the limited exhaustion requirement of § 1997e in order to relieve the burden on the federal courts by diverting certain prisoner petitions back through state and local institutions, and also to encourage the States to develop appropriate grievance procedures." *Id.* at 509.

A decade later, in *McCarthy v. Madigan*, 503 U.S. 140, 150 (1992), the Court held that the original § 1997e(a) was not mandatory. Rather, a court's discretionary determination to direct an inmate to exhaust his administrative remedies hinged on the court's finding that the available remedy was "plain, speedy, and effective," and that requiring its exhaustion would be "appropriate and in the interests of justice." *Id.*

Specifically to "preclude the *[Madigan]* result," *Booth v. Churner*, 121 S.Ct. 1819, 1825 (2001), Congress determined in 1996 that the rising number of federal civil rights actions brought by inmates required stronger legislative action. *See, e.g.*, 141 Cong. Rec. S26,548 (1995) (statement of Sen. Dole) (noting that prisoner suits had increased from 6600 in 1975 to more than 39,000 in 1994). Increasingly large amounts of federal judicial time

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brought pursuant to section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) by an adult convicted of a crime confined in any jail, prison, or other correctional facility, the court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period of not to exceed 180 days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available.

(2) The exhaustion of administrative remedies under paragraph (1) may not be required unless the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b) or are otherwise fair and effective.

and resources were being devoted to inmate actions, crowding federal dockets at every level. House Committee on the Judiciary, Violent Criminal Incarceration Act of 1995, H. Rep. No. 21, 104th Cong. 1rst Session 13 (1995) ("Too often prisoners initiate suits which are frivolous, malicious, or fail to state a claim for which relief can be granted. Such suits clog the courts, waste law enforcement resources, and hinder localities in their efforts to fight crime."). Many of these actions, Congress believed, were either frivolous, meritless or could have been addressed and rectified at the agency level. *See* 141 Cong. Rec. S14,572; S26,548; S26,553-54 (1995) (statements by Senators Dole and Kyl) (filing lawsuits has become a recreational activity for long-term residents of our prisons, because prisoners "have little to lose and everything to gain," and because filing frivolous complaints is "a means of gaining a short sabbatical in the nearest Federal courthouse"). *Cf., Cruz v. Beto*, 405 U.S. 319, 326-27 (1972) ("The inmate stands to gain something and lose nothing from a complaint stating facts that he is ultimately unable to prove. Though he may be denied legal relief, he will nonetheless have obtained a short sabbatical in the nearest federal courthouse.") (Rehnquist, *J.*, dissenting).

Against this landscape and in response to the Court's narrow construction of § 1997e(a) in *Madigan*, *see Booth*, 121 S.Ct. at 1825, Congress in 1996 significantly strengthened the exhaustion requirement by enacting the PLRA, § 803 of which repealed the previous version of § 1997e and replaced it with the following provision:

> (a) **No action shall be brought with respect to prison conditions** under section 1979 of the Revised Statutes of the United States (42 U.S.C. § 1983), **or any other Federal law,** by a prisoner confined in any

jail, prison, or other correctional facility **until such administrative remedies as are available are exhausted**. (emphasis supplied)

This provision made significant changes to the language and operation of § 1997e(a). First, the exhaustion requirement is no longer restricted only to § 1983 actions, but has been expanded to apply to all cases "brought . . . under any other Federal law." *See Madigan*, 503 U.S. at 150 (§1997e previously held inapplicable to *Bivens* claims).

Second, as this Court held unanimously in *Booth v. Churner*, 121 S.Ct. 1819, 1824 (2001), itself an excessive force case decided last term, the previous discretionary scheme "is now a thing of the past, for the amendments eliminated both the discretion to dispense with administrative exhaustion and the condition that the remedy be 'plain, speedy and effective' before exhaustion could be required." *Id.* at 1824. Thus, the exhaustion provision is now mandatory. *Id.* at 1824-25.

B. THE TEXT AND STRUCTURE OF THE PLRA AND THE EXHAUSTION PROVISION OF § 803 MANIFEST CONGRESS' CLEAR INTENT TO REQUIRE EXHAUSTION FOR EXCESSIVE FORCE CLAIMS.

The question in this case is whether Congress, in enacting what this Court in *Booth* described as the "obviously broader" and mandatory exhaustion requirement contained in the PLRA, intended by the term "prison conditions" to exclude claims of excessive force. *See Booth*, 121 S.Ct. at 1825. An examination of the PLRA as a whole reveals that Congress manifested no intent to

exempt such claims from the exhaustion requirement, but rather that Congress intended that an "action . . . with respect to prison conditions" include claims of excessive force.

The Court starts, "as always, with the language of the statute." *Williams v. Taylor*, 120 S.Ct. 1479, 1487 (2000). In this regard, it is appropriate to note the broad, mandatory and general rule that § 803 articulates: **"No action** shall be brought with respect to prison conditions . . . by a prisoner confined . . . until such administrative remedies as are available are exhausted." (emphasis supplied).

Thus, the Court of Appeals' first error in this case was to construe the term "action . . . with respect to prison conditions" against the backdrop of this Court's general rule in *Patsy* that exhaustion is not mandatory for § 1983 claims, instead of against Congress' specific rejection of the *Patsy* rule for inmate litigation. *Nussle*, 224 F.3d at 98. Congress established a new general rule of mandatory exhaustion for inmate suits,[5/] and as this Court has noted, "[i]n construing provisions . . . in which a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision." *Commissioner v. Clark*, 489 U.S. 726, 739 (1989).

Moreover, if there were any ambiguity about whether Congress intended the phrase "action . . . with respect to prison conditions" to include excessive force

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[5/] This conclusion is buttressed by the title of § 803, "Suits By Prisoners," which does not connote any limitation upon the types of suits the section addresses. *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (the title of a statute and the heading of a section are tools available for the resolution of doubt about the meaning of a statute).

claims, that ambiguity is clarified when the phrase is read in the light of this Court's interpretations of similar terms in similar contexts, as well as in light of other sections of the PLRA.

1. This Court Has Consistently Construed "Prison Conditions" Cases To Include Excessive Force Claims.

Construing the phrase "action . . . with respect to prison conditions" to include excessive force claims is entirely consistent with this Court's precedents regarding inmate cases, and specifically consistent with its Eighth Amendment jurisprudence.

In *Preiser v. Rodriguez*, 411 U.S. 496, 498-499 (1973), this Court faced the question of whether inmates alleging unconstitutional deprivations of good time credits can seek equitable relief under 42 U.S.C. § 1983, or whether they must seek habeas corpus relief. Noting that the "essence of habeas corpus is an attack by a person in custody upon the legality of that custody," *id.* at 484, and acknowledging the "literal applicability" of § 1983 to a claim of unconstitutional confinement, *id.* at 489, this Court held that the inmates' sole federal remedy in a claim involving the duration of confinement is a writ of habeas corpus. *Id.* at 500.

The Court in *Preiser* distinguished between "prisoners' claims related solely to the States' alleged unconstitutional treatment of them while in confinement," and challenges to "the very fact or duration of the confinement itself." *Id.* at 499. For the latter category of cases, when the relief sought is immediate or speedier release from prison, this Court then held that the prisoner's

"sole federal remedy is a writ of habeas corpus." *Id.* at 500. For the former category of cases, the Court held that "a § 1983 action is a proper remedy for a state prisoner who is making a constitutional challenge to the **conditions of his prison life**, but not to the fact or length of his custody." *Id.* at 499 (emphasis supplied).

The Court of Appeals below attempted to draw a distinction in Eighth Amendment jurisprudence between excessive force claims, on the one hand, and other conditions of confinement claims on the other. As it relates to § 803, the Court of Appeals reasoned, isolated or "particular" instances of excessive force do not constitute a "prison condition," while other, more systemic attributes of prison life do. *Nussle*, 224 F.3d at 99-101. This Court has already rejected such a distinction in "conditions" cases generally and Eighth Amendment cases specifically.

Indeed, in *Preiser*, the Court cited examples of inmate claims properly brought as civil rights actions challenging "the conditions of their confinement," including three cases -- *Cooper v. Pate*, 378 U.S. 546 (1964) (denial of religious publications); *Houghton v. Shafer*, 392 U.S. 639 (1968) (confiscation of legal materials); *Haines v. Kerner*, 404 U.S. 519 (1972) (placement of the prisoner in solitary confinement) -- involving single instances of alleged unconstitutional conduct.

Even more instructive is *McCarthy v. Bronson*, 500 U.S. 136, 139-43 (1991). In that case, the Court addressed the Magistrate's Act, 28 U.S.C. § 636(b)(1)(B) (J.A. 31), which permits District Courts, without consent, to refer certain cases, including "prisoner petitions challenging conditions of confinement," to magistrate judges for trial, proposed findings of fact and recommended dispositions in order to lessen the burden of inmate cases on District

Courts. The inmate in *Bronson* had brought an Eighth Amendment claim for excessive force that he claimed did not fall within the term "conditions of confinement," and therefore, he claimed, could not be referred to a magistrate judge without his consent.

This Court reemphasized that its opinion in *Preiser* "had described two broad categories of prisoner petitions: (1) those challenging the fact or duration of confinement itself; and (2) those challenging the conditions of confinement." *Id.* at 140. In construing the Magistrate's Act, 28 U.S.C. § 636(b)(1)(B), the Court noted that the language in that statute "describes these same two categories." *Id.* at 141. The Court stated: "We do not quarrel with petitioner's claim that the most natural reading of the phrase 'challenging conditions of confinement,' when viewed in isolation, would not include suits seeking relief from isolated episodes of unconstitutional conduct. However, statutory language must always be read in its proper context." *Id.* at 139. The Court went on to note that the "text of the statute does not define the term 'conditions of confinement' or contain any language suggesting that prisoner petitions should be divided into subcategories." *Id.* On the contrary, when the relevant section is read in its entirety, "it suggests that Congress intended to authorize the nonconsensual reference of **all** prison petitions to a magistrate." *Id.* at 139 (emphasis supplied).

In rejecting the inmate's argument in *Bronson* -- repeated by Nussle and the Court of Appeals in this case -- that "the ordinary meaning of the words 'conditions of confinement' includes continuous conditions and excludes isolated incidents," *id.* at 139, the Court specifically noted that *Cooper*, *Houghton* and *Haines* each involved challenges to specific instances of unconstitutional conduct, which the *Preiser* Court had described as challenges to

"conditions of confinement." *Id.* at 142. Moreover, the Court noted, its construction "furthers the policy of the Act because its simplicity avoids the litigation that otherwise would inevitably arise in trying to identify the precise contours of [the] suggested exception for single episode cases. Petitioner's definition would generate additional work for the district courts because the distinction between cases challenging ongoing conditions and those challenging specific acts of alleged misconduct will often be difficult to identify." *Id.* at 143.

Shortly after *Bronson*, this Court again rejected the distinction between short-term and long-term "conditions" that would constitute Eighth Amendment violations. In *Wilson v. Seiter*, 501 U.S. 294, 299-300 (1991), the inmate argued specifically that for "short term" Eighth Amendment claims, such as medical deprivation, there is a state of mind requirement (requiring at least "deliberate indifference"), but that no such proof of state of mind should be necessary to make out a "long term" Eighth Amendment claim, such as for deprivation of heat or food. The Court held that distinguishing between situations on a temporal basis is illogical and impractical, and more importantly found no support in the Eighth Amendment itself:

> Petitioner, and the United States as *amicus curiae* in support of petitioner, suggests that we should draw a distinction between "short-term" or "one-time" conditions (in which a state-of-mind requirement would apply) and "continuing" or "systemic" conditions (where official state of mind would be irrelevant). We perceive neither a logical nor a practical basis for that distinction. The source of the intent requirement is not the predilections of this

> Court, but the Eighth Amendment itself, which bans only cruel and unusual punishment.

Id. at 300.

Thus, for example, claims regarding inadequate medical attention, lodging two inmates in a cell or the shooting of an inmate by a guard, each required inquiry into the prison official's state of mind under the Eighth Amendment. *Id.* at 297-99, *citing Estelle v. Gamble,* 429 U.S. 97 (1976); *Rhodes v. Chapman,* 452 U.S. 337 (1981); *Whitley v. Albers,* 475 U.S. 312 (1986). In response to the concurrence's contention in *Wilson* -- which echoes in the Court of Appeals' decision in this case -- that these examples did not involve "conditions of confinement," but rather "specific acts or omissions directed at individual prisoners," the Court stated:

> if an individual prisoner is deprived of needed medical treatment, that is a condition of *his* confinement, whether or not the deprivation is inflicted upon everyone else. Undoubtedly deprivations inflicted upon all prisoners are, as a policy matter, of greater concern than deprivations inflicted upon particular prisoners, but we see no basis whatever for saying that the one is a "condition of confinement" and the other is not. . . .

Id. at 299 n.1 (emphasis in original).

In concluding that there is no practical or constitutional distinction between "one-time" conditions and "systemic" conditions, the Court in *Wilson*, as it had in *Bronson*, recognized the impossible task that District

Courts would face in attempting to differentiate between long term and short term "prison conditions":

> The long duration of a cruel prison condition may make it easier to establish knowledge and hence some form of intent, . . . but there is no logical reason why it should cause the requirement of intent to evaporate. The proposed short-term/long-term distinction also defies rational implementation. Apart from the difficulty of determining the day or hour that divides the two categories (Is it the same for all conditions?), the violations alleged in specific cases often consist of composite conditions that do not lend themselves to such pigeonholing. *Cf. McCarthy v. Bronson*, 500 U.S. 136, 143-144 (1991).

Id. at 300-01 (citations omitted).

The Court of Appeals below suggested that this Court's Eighth Amendment jurisprudence supports a distinction between excessive force claims and "prison conditions" claims. The cases cited by the Court of Appeals -- *Hudson v. McMillian*, 503 U.S. 1, 9 (1992), and *Farmer v. Brennan*, 511 U.S. 825, 834-36 (1994) -- stand only for the proposition that excessive force claims and other prison condition claims have differing state-of-mind requirements, **not** that an excessive force claim is for all purposes something other than a prison condition claim. To import the distinction drawn solely for the purpose of articulating the appropriate elements for different categories of prison condition claims into § 803's use of the phrase "prison conditions" would stretch the reasoning of *Hudson* and *Farmer* well beyond its reach and would run directly counter to a common sense understanding of Congress'

intent in light of *Wilson* and *Bronson*. Nothing in the text or legislative history of the PLRA suggests that Congress intended to incorporate these substantive standards for claims under the Eighth Amendment to differentiate between the types of prisoner actions that should be subjected to exhaustion.

Moreover, exempting excessive force and other "episodic" claims from the interpretation of "actions . . . with respect to prison conditions," would, contrary to *Bronson* and *Wilson*, require the district courts continually to make and revisit judgments about which kinds of claims are systemic, for purposes of exhaustion, and which are not. Does excessive force become a systemic condition of confinement subject to exhaustion if it is widespread or occurs with regularity over time? If so, how long must the pattern endure? How many inmates must be affected by how many staff members? Must the force and circumstances be identical in all instances? *Cf.*, *Wilson v. Seiter*, 501 U.S. at 300-01.

Indeed, in a series of decisions in the wake of *Nussle*, the Second Circuit Court of Appeals has begun to illustrate the ramifications of its decision in this case. In these decisions, that Court has taken the exemption from exhaustion well beyond excessive force claims -- thus abandoning the apparently dispositive distinction it drew in *Hudson* and *Farmer* -- and has espoused the proposition that exhaustion is only required for prisoner claims involving prison policy or systemic practices. *E.g.*, *Marvin v. Goord*, 255 F.3d 40, (2d Cir. 2001) (claims of denial of access to mail, violation of religious freedom, deliberate indifference to medical needs); *Giano v. Goord*, 250 F.3d 146, 150 (2d Cir. 2001) (challenge to drug testing procedures); *Lawrence v. Goord*, 238 F.3d 182, 185 (2d Cir. 2001) (alleged retaliation for complaints about prison

official's conduct), *petit. for cert. filed*, 69 U.S.L.W. 3702 (U.S. Apr. 17, 2001). This approach would undermine the PLRA's purpose of easing the burdens on federal courts created by prisoner litigation. *See Freeman v. Francis*, 196 F.3d 641, 643-45 (6th Cir. 1999). Further, this approach would lead to the absurd result in which widespread, systemic uses of force or brutality, impacting many inmates, must be administratively exhausted, while single episodes of excessive force can proceed immediately to federal court.

Applying the phrase "action . . . with respect to prison conditions" broadly, as the Court has done with similar phrases in *Wilson* and *Bronson*, obviates the need to engage in such arbitrary line drawing and categorizing.

2. In The PLRA, Congress Adopted This Court's Understanding That "Actions With Respect To Prison Conditions" Includes Excessive Force Claims.

Congress plainly intended to use the phrase "actions . . . with respect to prison conditions" in § 803 in the broad sense employed by this Court in *Wilson* and *Bronson*. Additional support for this conclusion is found in the language of other portions of the PLRA. As it did in the Magistrate's Act at issue in *Bronson*, Congress by the very terms of the PLRA, has expressly adopted this Court's understanding that there are "two broad categories of prisoner petitions: (1) those challenging the fact or duration of confinement itself; and (2) those challenging the conditions of confinement." *McCarthy v. Bronson*, 500 U.S. 136, 140 (1991). By excluding "habeas corpus proceedings challenging the fact or duration of confinement

in prison"[6] from the definition of "actions with respect to prison conditions" in the closely related § 802 of the PLRA, Congress articulated this same categorization for purposes of § 803 exhaustion.

a. The Definition Of "Action With Respect To Prison Conditions" Contained In § 802 Of The PLRA Illuminates The Meaning Of The Same Phrase In § 803.

Although § 803 of the PLRA (42 U.S.C. § 1997e(a)) does not contain a definition of the phrase "action . . . with respect to prison conditions," the immediately preceding and closely related section of the PLRA, § 802, codified at 18 U.S.C. § 3626, does contain such a definition. Specifically, § 802 provides that:

> [T]he term "civil action with respect to prison conditions" means any civil proceeding arising under Federal law with respect to the **conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison,** but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison. (emphasis supplied).

"[L]anguage used in one portion of a statute . . . should be deemed to have the same meaning as the same language used elsewhere in the statute." *Mertens v. Hewitt Associates*, 508 U.S. 248, 260 (1993). *See also Commissioner v. Lundy*, 516 U.S. 235, 250 (1996). Indeed, "[t]he normal rule of statutory construction assumes that 'identical words used in different parts of the same act are intended to have the same meaning.'" *Sorenson v. Secretary of the Treasury*, 475 U.S. 851, 860 (1986), *quoting Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934). *See also Miller v. French*, 530 U.S. 327, 336 (2000) (construing automatic stay provision of § 802 in context of statute as a whole). There are compelling reasons to follow the "normal rule" in this case.[7]

Given the proximity of the two sections within the PLRA, there could hardly be a clearer case in which to presume that Congress intended that the term have the same meaning in different parts of the same act. Section 802 of the PLRA, which limits the type and the scope of remedies available in prison cases, immediately precedes the exhaustion provision in § 803, and both sections were passed at the same time. *See Commissioner v. Lundy*, 516 U.S. 235, 249-50 (1996) ("we have been given no reason to believe that Congress meant the term 'claim' to mean one thing in section 6511 but to mean something else altogether **in the very next section of the statute**") (emphasis supplied).

Moreover, § 802 shares a general purpose with § 803: curbing the extent to which federal courts expend resources on and become entangled with the administration of state and federal prisons.[8] *Booth*, 206 F.3d at 294. *See*

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[6] State inmates' habeas corpus petitions have their own exhaustion of remedies requirement. 28 U.S.C. § 2254(b)

[7] Although § 802's definitional section begins with the phrase "[a]s used in this section," this does not preclude its use in construing § 803, particularly in light of the compelling evidence of congressional intent supporting its use and the absence of definitions in § 803. *See Vermont Agency of Natural Resouces v. United States ex rel. Stevens*, 529 U.S. 765, 784 & nn.13-14 (2000) (noting that applying a definition of a term from one statutory section for the purposes of a second section, where that term is not defined in the definitional section of the second section, is inappropriate, particularly given other evidence of intent that did not support its application).

[8] The Court of Appeals below took the view that sections 802 and

also Lewis v. Casey, 518 U.S. 343, 361 (1996) (deferring to prison administrators to "make difficult judgments concerning institutional operations"); *Turner v. Safley*, 482 U.S. 78, 84-85 (1987) (same); *Preiser*, 411 U.S. at 492 (1973) ("[B]ecause most potential litigation involving state prisoners arises on a day-to-day basis, it is most efficiently

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803 of the PLRA "advance distinct statutory purposes," justifying a different construction of the same phrase found in adjacent sections of the act. *Nussle*, 224 F.3d at 103. "While 42 U.S.C. § 1997e(a) is concerned with filtering out frivolous suits administratively, before they get to court, 18 U.S.C. § 3626 -- codified in an entirely different title of the U.S. Code -- is concerned with the different purpose of preventing 'courts from micromanaging prison systems . . . [and] usurping the authority given to prison administrators to decide matters of routine prison administration." *Id.* (quotation omitted). This view is far too myopic. As the Seventh Circuit has held, and as the legislation's title ("Prison Litigation Reform Act") indicates:

> Both sections are devoted to various aspects of prison litigation, including: settlement agreements, the appointment of special masters, attorneys' fees awards, the use of telephonic hearings, waiver, and limitations on recovery. Neither statute is a one-issue act and both are tailored to address problems unique to incarcerated litigants. More importantly, both are part of the same legislation with the same overarching objectives -- to enable prison officials to resolve complaints internally and to limit judicial intervention in the management of state and federal prisons.

Smith, 2001 U.S. App. Lexis 14339, at * 4.

Moreover, the view that the two sections have different purposes, and therefore cannot share the same definition, begs a fundamental question: does the Court have to seek, or should Congress be presumed to have intended, an entirely different definition for a term in a different section merely because the two sections are aimed at different, although clearly related, ends?

and properly handled by the state administrative bodies and state courts.").

Thus, "[t]he interrelationship and close proximity of these provisions of the statute presents a classic case for application of the 'normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.'" *Lundy*, 516 U.S. at 250, *quoting Sullivan v. Stroop*, 496 U.S. 478, 484 (1990). It is therefore entirely reasonable and proper to assume that Congress intended the definition of "action with respect to prison conditions" found in § 802 of the PLRA to inform the construction of the same phrase in § 803.

b. Under Either Prong of § 802's Definition, An Excessive Force Claim Is An "Action . . . With Respect To Prison Conditions."

So that there could be no mistake about the expansiveness and inclusiveness of the new and mandatory exhaustion requirement, Congress defined "action with respect to prison conditions" in § 802 broadly to include not only the often-used term "conditions of confinement," but the more encompassing phrase "the effects of actions by government officials on the lives of persons confined in prison." 18 U.S.C. § 3626(g)(2). Under either prong of the § 802 definition, the Court should conclude that excessive force claims are subject to exhaustion.

Indeed, "a common sense reading" of the phrase "prison conditions" in § 803, and of either prong of the definition contained in §802, compels the conclusion that Congress has textually manifested its intent to include excessive force claims within the scope of the PLRA's mandatory exhaustion provision. *Booth*, 206 F.3d at 295. In fact, by the dual definition in § 802, it has expressed this

intent "even more clearly" than it did in the Magistrate's Act, construed in *Bronson*. *Id.* To accept the view of the Court of Appeals and of Nussle would mean, anomolously, that the two pronged definition found in § 802 ("conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison") would be narrower than the single term "conditions of confinement" in the Magistrate's Act, which in *Bronson* sufficed to include excessive force claims. *Id.* at 296 n.5.[9/]

i) The Phrase "Conditions Of Confinement" Includes Excessive Force Claims.

The phrase "prisoner petitions challenging **conditions of confinement**" in § 802 is essentially identical

[9/] The phrase "action brought with respect to prison conditions" appears in another subsection of section 803 of the PLRA -- 803(7) -- which is codified at 42 U.S.C. 1997e(c). That section provides that a district court may dismiss sua sponte any "action brought with respect to prison conditions" that is "frivolous, malicious, fails to state a claim upon which relief may be granted or seeks monetary relief from a defendant who is immune." 42 U.S.C. 1997e(c). If the definition of "civil action with respect to prison conditions" contained in Section 802 does not apply to Section 803, a district court has no discretion under 803(7) to dismiss an excessive force claim that is frivolous, malicious, fails to state a claim, or seeks monetary damages from an immune defendant," even if such claim is patently a product of fantasy or delusion. This result clearly undercuts the PLRA's purpose of reducing the burdens placed on district courts by inmate lawsuits. "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme -- because the same terminology is used elsewhere in a context that makes its meaning clear or because only one of the permissible meanings produces a **substantive effect that is compatible with the rest of the law.**" *United States Savings Assoc. of Texas v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 371 (1988) (emphasis supplied, internal citation omitted).

to "actions . . . with respect to **prison conditions**," found in § 803. The phrases on their face appear synonymous.

Evidence that Congress intended them to have the same meaning is its definition "action with respect to prison conditions" to include "proceeding . . . with respect to conditions of confinement." As discussed above, in a very similar context, this Court in *McCarthy v. Bronson*, 500 U.S. 136, 139-43 (1991), has already construed "conditions of confinement," to encompass specific episodes of unconstitutional conduct by prison officials, **including Eighth Amendment claims of excessive force.** The Court stated: "The broader reading we adopt . . . comports with the policy behind the Act. . . . to assist federal judges 'in handling an ever-increasing caseload'" by allowing the "referral of broader category of cases." *Id.* at 142-43, *quoting* S. Rep. No. 94-625, p. 2 (1976).

This Court has often held that "Congress will be presumed to have legislated against the background of our traditional legal concepts"; *United States v. United States Gypsum Co.*, 438 U.S. 422, 437 (1978); specifically that Congress is presumed to be aware of this Court's interpretations of its statutes; *Lorillard v. Pons*, 434 U.S. 575, 580, 98 S.Ct. 866 (1978); and that Congress is presumed to expect its statutes to be read in conformity with the Court's precedents. *United States v. Wells*, 519 U.S. 482, 495 (1997). Thus, by enacting a 1996 statute that relates to inmate litigation and the preservation of federal judicial resources against a legal landscape in which the Court in its 1991 *Bronson* opinion had construed the same phrase ("conditions of confinement") to include excessive force claims, Congress plainly manifested an intent to include allegations of excessive force within the sweep of the Act. *See Freeman v. Francis*, 196 F.3d 641, 644 (6th Cir. 1999).

The Court of Appeals made no effort whatsoever to deal with this precedent. In fact, the Court of Appeals' statement that "'conditions of confinement' is 'no more apt' to include particular instances of assault or excessive force than the reference to 'prison conditions'" in § 803 demonstrates a total disregard for *Bronson's* holding. *Nussle*, 224 F.3d 95 at 102.

ii) The Phrase "The Effects Of Actions By Government Officials On The Lives Of Persons Confined In Prison" Includes Excessive Force Claims.

As the Third Circuit has reasoned, the phrase "the effects of actions by government officials on the lives of persons confined in prison" refers "to civil actions ranging from excessive force actions . . . to actions 'with respect to' a prison official's decision not to make basic repairs in the prison, or intentionally to deny a prisoner food, heating or medical attention. All of these actions affect the lives of prisoners similarly. They make their lives worse." *Booth*, 206 F.3d at 295. *See also Smith v. Zachary*, 2001 U.S. App. Lexis 14339, * 5-6 (7th Cir. 2001) ("He was affected by an action, allegedly an assault, by government officials, viz., prison guards."). Plainly, a guard's alleged use of excessive force falls within "the effects of actions by government officers" upon Nussle's life, and thus within the PLRA's exhaustion provision. Every other Court of Appeals that has addressed the issue has so concluded, contrary to the Second Circuit in this case. *See Higginbothom v. Carter*, 223 F.3d 1259, 1260-61 (11th Cir. 2000); *Freeman v. Francis*, 196 F.3d 641, 643-44 (6th Cir. 1999).

In considering the § 802 definition, the Court of Appeals below thought the language too "awkward" to "ordinarily" describe instances of excessive force. Specifically, it quoted the dissent from the Third Circuit decision in *Booth*, which argued:

> A guard hits you in the mouth. Would you report the blow by saying, 'A government official has taken an action having an effect on my life?' No speaker of English would use such a circumlocution. Why should we attribute such circuitousness to Congress? When bones are broken or mouths are mauled, no one on earth, educated or uneducated, would use such roundabout phraseology to express the blow.

Nussle, 224 F.3d at 103, *quoting Booth*, 206 F.3d at 302 (Noonan, *J.*, dissenting in relevant part).

This observation proves too much, however, since it could be made just as persuasively about a lawsuit against a prison barber for a bad haircut, or against a warden for failing to invite an inmate to a pizza party, episodes described in the legislative history as among the paridigmatic lawsuits that the PLRA sought to discourage. *See* 141 Cong. Rec. S26,548 (1995) (statement of Sen. Dole). "Would you report [the bad haircut or the pizza party slight] by saying, 'A government official has taken an action having an effect on my life?'" *Nussle*, 224 F.3d at 103, *quoting Booth*, 206 F.3d at 302 (Noonan, *J.*, dissenting in relevant part). What the Court of Appeals in this case and the dissenting judge in *Booth* describe is simply a reflection of the formality of legislative language and the imprecision that often accompanies a legislature's attempt to sweep broadly.

C. THE PLRA'S LEGISLATIVE HISTORY PLAINLY DEMONSTRATES AN INTENT THAT THE EXHAUSTION REQUIREMENT APPLIES TO EXCESSIVE FORCE CLAIMS.

The legislative history of the PLRA exhaustion provision also supports a construction of the term "prison conditions" that includes excessive force claims. Both the manner in which the provision was amended and the legislative statements that accompanied Congress' action undermine any conclusion to the contrary. *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 557, 580-82 (1995) (legislative history given weight when speaks with clarity regarding statutory question).

"Congress did not enact the PLRA in a vacuum." *Alexander v. Hawk*, 159 F.3d 1321, 1324 (11th Cir. 1998). Rather, Congress took note of the fact that the increase in cases brought by inmates was causing gridlock in the nation's federal courts. 141 Cong. Rec. S14,571; S26,548 (1995) (statements of Sen. Dole) (noting that prisoner suits had increased from 6600 in 1975 to more than 39,000 in 1994); 141 Cong. Rec. S14,572 (1995) (statement of Sen. Kyl) (in 1994, prisoners brought more than one-fourth of all civil suits filed in the United States District Courts: 60,086 of the 238,590 total suits filed). In reporting the 39,000 lawsuits filed by inmates in federal courts in 1994, Senator Hatch noted that this number specifically excludes "habeas corpus petitions or other cases challenging the inmate's conviction or sentence." 141 Cong. Rec. S26,553 (1995) (statement of Sen. Hatch). This is consistent with this Court's understanding in *Preiser, Wilson* and *McCarthy* that there are two categories of prisoner cases -- conditions cases and habeas cases. Moreover, the 39,000 figure derives from a Department of Justice study that specifically

includes excessive force claims within its ambit, demonstrating that Congress intended to include excessive force cases within the PLRA exhaustion requirement.[10/] R. Hanson and H. Daley, *U.S. Dept. of Justice, Conditions of Prisons and Jails: A Report on Section 1983 Litigation* (1995).

The Court of Appeals below ignored these legislative statements completely, choosing to rely instead upon the statements about lawsuits over the types of peanut butter provided in prison and the failure to be invited to a pizza party. 141 Cong. Rec. S14,413 (1995) (statement of Sen. Abraham). These statements are admittedly more prevalent in the legislative history, but only because they so vividly illustrate the types of lawsuits prison officials confront. The statements by no means provide a basis for concluding, as the Court of Appeals did here, that Congress intended to distinguish between claims that may be frivolous as to subject matter versus claims that could be meritorious if proven factually. *Nussle*, 224 F.3d at 105. The Court of Appeals' embellishment upon the legislative language and its conclusion that the exhaustion requirement applies only to claims that are "frivolous as to subject matter" are unwarranted for several reasons.

First, while restricting frivolous claims was one purpose of the PLRA, and § 803 specifically; *Alexander v. Hawk*, 159 F.3d 1321, 1324 (11th Cir. 1998) (Congress concluded that prisoners file more frivolous lawsuits than

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[10/] It is also clear from statements on the floor of the Senate that members of Congress understood that this amendment would apply to excessive force cases. *See* 141 Cong. Rec. S14,628 (1995) (statement of Sen. Biden) (opposing the PLRA and discussing two prison assault cases as examples of suits that would be hindered by the passage of the PLRA); 141 Cong. Rec. S14,570 (1995) (Statement of Sen. Dole) (referring to "cruel and unusual punishment" complaints).

any other class of persons); 141 Cong. Rec. S26,548; S26,553; S14,572; H35,624 (Statements of Dole, Hatch, Kyl, LoBiondo) (1995) (§ 803 intended to "curtail the ability of prisoners to bring frivolous and malicious lawsuits" by requiring exhaustion); it was not the only purpose. "[N]or is it the only benefit garnered from requiring litigants to utilize the prison grievance process before filing suit in court." *Smith*, 2001 U.S. App. Lexis 14339, at *10. As evidence of this, § 803(a) does not confine itself to "frivolous" cases, let alone cases "frivolous as to subject matter." There simply is no principled way, based on the statutory language and legislative history, to carve out excessive force claims from the universe of claims that prisoners might bring, some of which undoubtedly may raise serious constitutional issues, and some of which may not. The legislation leaves no room for a court to assess the substantiality of the allegations before deciding whether exhaustion is required. Instead a court looks only to whether the inmate has exhausted available administrative remedies; if he has not, the court must dismiss the action.

Moreover, § 803(7), codified at 42 U.S.C. § 1997e(c), specifically addresses frivolous suits. This subsection gives courts the power, on their own motion and without requiring exhaustion, to dismiss actions "with respect to prison conditions" "if the court is satisfied that the action is frivolous, malicious or fails to state a claim." *See* note 9 *supra*. Consequently, the Court need not -- and in fact should not -- read a frivolousness component into subsection (a).

Finally, as the Seventh Circuit aptly noted: "Excessive force claims can be frivolous." *Smith*, 2001 U.S. App. Lexis 14339, at *14. Inmates can, and often do, fabricate or embellish claims of excessive force. This

Court has explicitly recognized that the term "frivolous," "when applied to a complaint, embraces not only the inarguable legal conclusion, but also the fanciful factual allegation." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989).

Requiring that inmates exhaust those claims before bringing them to federal court furthers, and does not undercut, the policies of the PLRA generally, and the exhaustion requirement specifically. The statistical data that was presented to Congress regarding the flood of inmate cases "supports the conclusion that § 1997e(a) applies to *all* prisoner lawsuits, all of which have the *potential* to be frivolous and unduly burden courts, rather than a particular subcategory of claims . . . ." *Booth*, 206 F.3d at 298 n.9 (emphasis in original).

In short, to accept the view of Nussle and the Court of Appeals below, this Court would have to conclude that in passing the PLRA, Congress intended to exclude from its reach one out of the myriad types of § 1983 claims that prisoners might file. Not only is there nothing in the statute's plain language to support this argument, there is nothing in the legislative history of the Act that could in any way lead the Court to this conclusion. As the District Court stated below: "there is no reason to believe, nor is there any evidence that Congress actually believed, that excessive force claims are more meritorious than any other category of prisoner litigation." (J.A. 50)

D. BOTH THE PURPOSE OF THE PLRA AND THE POLICY UNDERLYING EXHAUSTION ARE WELL-SERVED BY APPLYING § 803 TO EIGHTH AMENDMENT EXCESSIVE FORCE CLAIMS.

Reading the term "prison conditions" to include excessive force claims like Nussle's is consistent with the purposes of the PLRA: to reduce the number of prisoner lawsuits and to reduce federal court intrusion into the management of prison systems. *See Booth v. Churner*, 121 S.Ct. 1819, 1823 (2001); *Miller v. French*, 530 U.S. 327, 336 (2000). Moreover, it is consistent with the policies underpinning the exhaustion doctrine.

In passing the PLRA, Congress took note of the fact that nearly one-quarter of all civil cases commenced in the District Courts were commenced by inmates. *See* 141 Cong. Rec. S14,572 (1995) (statement of Sen. Kyl). It is therefore no exaggeration to state that this Court's ruling on this issue will impact upon thousands of cases in the federal courts.

To the extent that Congress intended that the exhaustion requirement might deter inmates from making allegations of excessive force that are fictitious, or in some fashion might provide the inmate with relief that will prevent him from bringing a federal action (e.g., relocation of the inmate or reassignment of a guard), the provision will have served both its legislative purpose, and the purpose of exhaustion generally.

In addition, Congress intended by the PLRA to "reduce the intervention of federal courts into the management of the nation's prison systems." *Booth*, 206 F.3d at 295; *Freeman*, 196 F.3d at 644. As applied to state prison systems, such as Connecticut's, this goal is

consistent with this Court's view that "the strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors . . . also require giving the States the first opportunity to correct the errors made in the internal administration of their prisons." *Lewis v. Casey*, 518 U.S. 343, 362 (1996); *see Preiser v. Rodriguez*, 411 U.S. 475, 492 (1973). This policy is just as applicable to a prison system's right and obligation in the first instance to review and address within the prison administration claims of excessive force.

Moreover, the requirement that an inmate exhaust his administrative remedies, even for a claim of excessive force, serves an important policy associated with the exhaustion doctrine generally and with the PLRA exhaustion requirement particularly. Specifically, such a requirement compels an inmate to make his allegation in a timely fashion, thereby providing the correctional facility with the opportunity to conduct a prompt investigation into the matter. This result benefits the interests of both the facility and the inmate by providing prison administrators with notice of the incident and the ability to take prompt corrective action, if warranted, while protecting the facility and its employees from stale or fabricated allegations that might be impossible to investigate thoroughly, or defend, years later. In the event an investigation reveals merit to an inmate's claim, it also permits the facility to promptly root out dangerous employees and corruption, which jeopardize not only the safety of inmates, but also the security of the institution and the morale of the staff. *Smith*, 2001 U.S. App. Lexis 14339, at *12-13.

As the Sixth Circuit has stated:

> A broad exhaustion requirement that includes excessive force claims effectuates

> [the] purpose [of the statute] and maximizes the benefits of requiring prisoners to use prison grievance procedures before coming to federal court. Prisons need to know about and address claims of excessive force as they would any other claim concerning prison life so that steps may be taken to stop problems immediately if they exist.

Freeman, 196 F.3d at 643-45 .

Requiring exhaustion in excessive force cases, as much as in other cases (if not more), also advances the policy of permitting the prison administration to create a timely and accurate record of the conduct and actions complained of by those close to the scene, as well as help "focus and clarify poorly pled or confusing claims, and [force] the prison to justify or explain its internal procedures." *Booth*, 206 F.3d at 299 n.9.[11/]

This case is a particularly good example of why administrative remedies should be exhausted even in excessive force cases. Nussle waited nearly three years to

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[11/] Congressman LoBiondo paraphrased a letter from former United States Attorney General Richard Thornburgh on the House floor, commenting that the administrative process could assist the district courts in fact-finding and focus the court on the issues: "An administrative review process would also aid the Federal courts by allowing for preliminary fact-finding and the creation of a record at the Bureau level, so as to clarify the issues to be presented to the court." 141 Cong. Rec. H35,623-24 (1995). This is no less true in an excessive force case. *See also Booth*, 121 S.Ct. at 1823 ("one may suppose that the administrative process itself would filter out some frivolous claims and foster better-prepared litigation once a dispute did move to the courtroom, even absent formal fact-finding); *Madigan*, 503 U.S. at 145 (noting exhaustion "may produce a useful record for subsequent judicial consideration"); *Smith*, 2001 U.S. App. Lexis 14339, at *10, 13 ("The process also helps develop the factual record, before the prisoner moves to the courtroom. . . . [This] "may help rather than hinder prisoners, enabling them to succinctly present their cases.").

bring his § 1983 action. Although he complied with the statute of limitations, the timing of his filing puts prison officials and the individual defendants at a disadvantage in defending the action, and if his allegations are to be believed, left potentially abusive officials in place without sanction for three years. The filing of a grievance immediately after the alleged incident could have addressed both of these concerns.[12/]

A chief objection to a construction of the phrase "action . . . with respect to prison conditions" that includes excessive force claims within the exhaustion requirement is the implicit assumption that the prison will not seriously address the claim, and that this extra requirement will simply prevent inmates from vindicating their claims. There are at least two responses to this concern.

First, Congress did not, and this Court should not, indulge in a presumption that a prison administration will not seriously investigate misconduct by its officials. *Cf. Preiser*, 411 U.S. at 494-95 ("there is no reason to assume that state prison administrators . . . will not act expeditiously."). The theory of the legislation, as well as the theme of this Court's precedents, affords the prison

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[12/] Further, if the incident ever happened, Nussle himself would have benefited from the administrative review, as demonstrated by his naming of Correction Officer Willette as a defendant. As the petitioners alerted Nussle and the courts below, no such officer exists, but by the time that fact became clear to the plaintiff, the statute of limitations had expired. Had he pursued a timely grievance of this matter, however, it is likely he not only would have discovered that "Willette" was not the name of any correctional officer, but likely would have been able to correctly identify the other "unknown correctional officers" who allegedly participated, (Plaintiff's Complaint, paragraph 10. (JA 39)) and the identities of other persons who might have witnessed the alleged incident, if it in fact occurred. Thus, a prompt and mandatory grievance procedure will benefit not only the courts, but also the interests of inmates and correctional facilities alike.

administration the opportunity in the first instance to investigate these claims and take corrective action if necessary. *Id.* at 491-92.

Second, this argument is nothing more than a claim of futility, which this Court has rejected generally with regard to mandatory exhaustion provisions, and specifically with regard to the PLRA exhaustion provision itself. This Court has held: "Where exhaustion is a statutorily specified prerequisite, the requirement . . . may not be dispensed with merely by a judicial conclusion of futility." *Weinberger v. Salfi*, 422 U.S. 749, 766 (1975). In *Booth v. Churner*, specifically, this Court has held that the PLRA's exhaustion provision is mandatory, and adheres notwithstanding that "the odds of keeping the matter out of court are slim," and even if it were true that the "prisoner would be clearly burdened, while the government would obtain little or no value in return." 121 S.Ct. at 1825. "Although we have not accorded much weight to [the] possibilities [of administrative benefits] in the past . . . Congress [after *McCarthy v. Madigan*] . . . may well have thought we were shortsighted." *Id.*

Finally, requiring exhaustion will not prevent Nussle or others with constitutional grievances from ultimately filing federal actions to obtain damages for them. *Smith*, 2001 U.S. App. Lexis 14339, at *12-13 ("The requirement is not designed to stop prisoners from filing suits, but rather to facilitate the litigation process."); 141 Cong. Rec. S27,042 (1995) (statement of Sen. Hatch) ("I do not want to prevent inmates from raising legitimate claims. This legislation will not prevent those claims from being raised."). Rather, Congress has simply added a preliminary exhaustion requirement prior to the commencement of suit, and has done so because it has determined, after holding hearings and gathering information, that inmate cases

generally have less merit and clog the federal courts more than do other classes of cases.

Said another way, the petitioners do not deny, as the Court of Appeals seems to have believed they do, that there is a "difference between punching a prisoner in the face and serving him unappetizing food." *Nussle,* 224 F.3d at 106, *quoting Hudson v. McMillan*, 503 U.S. 1, 11 (1991). The point simply is that Congress intended the exhaustion requirement to encompass both types of claims.

CONCLUSION

Given this Court's construction of similar language in *Bronson*, the context of the legislation, the breadth of its intended application and the legislative history surrounding its enactment, the most reasonable construction of the language of § 1997e(a) is that Congress intended the exhaustion requirement to apply to all types of prisoner claims. There is no reason to believe that Congress intended to exempt the plaintiff's particular type of case from the general exhaustion requirement.

For all of the foregoing reasons, this Court should reverse the judgment of the Court of Appeals, and remand this case to that Court with directions to affirm the District Court's dismissal.

Respectfully submitted,
Petitioners

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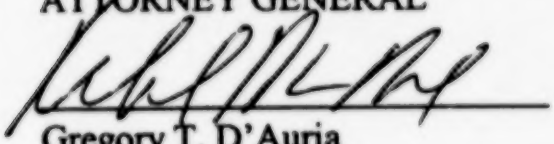

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